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No. 09-___

IN THE

Supreme Court of the United States

RE'LICKA DAJUAN ALLEN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the passage of the Adam Walsh Act, which made possession of child internet pornography electronic data by defense counsel illegal, violated the defendant's rights under the Fifth and Sixth Amendments of the United States Constitution.

PARTIES TO THE PROCEEDING

The Petitioner in this Court is Re'licka Dajuan Allen. The Respondent is the State of Tennessee.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Re'licka Allen respectfully petitions, under Supreme Court Rule 12.4, for a writ of certiorari to the United States Supreme Court from the denial of permission to appeal by the Tennessee Supreme Court under Rule 11 Tennessee Rules of Appellant Procedure.

OPINIONS BELOW

The opinion of the Tennessee Court of Criminal Appeals is published at is attached in the Appendix.

STATEMENT OF JURISDICTION

The Tennessee Supreme Court issued its order denying Petitioner permission to appeal under Rule

11, Tennessee Rules of Appellant Procedure on August 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1257A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment.

United State Constitution, Sixth Amendment.

STATEMENT OF THE CASE AND FACTS

On June 17, 2003, a three count indictment was returned against Mr. Allen. The indictment charges Mr. Allen with violations of T.C.A. §§ 39-17-1003, 1004 (internet child pornography).

The charges against Mr. Allen stemmed from "material located on [Mr. Allen's] computer" which was discovered by a computer repair technician. *State v. Richard Allen Butler*, No. E2004-00359-CCA-R9-CD, 2005 WL 735080, *1 (Tenn.Crim.App. March 30, 2005) (unpublished).

Mr. Allen filed a motion for discovery, including [a] request that the State "provide [him] with copies of the computer hard drives and 'other computer materials.'" *Id.* The State refused, offering to make the material available for examination by defense counsel and defense computer experts at the Knox County Sheriff's Department, but contending that it would constitute a violation of the sexual exploitation of minors statute for the material to be removed from the custody and control of the sheriff's department. In response, counsel filed motions to compel the production of the evidence.

At a hearing before the trial court, defense expert (Herbert Mack) testified that the examination of a

mirror image hard drive at the sheriff's department would be inadequate because of:

- The time it would take the expert to conduct the analysis;
- The expert would require the assistance of the expert's support personnel;[1] The expert "would need to consult regularly with counsel with respect to whether any sexually explicit files he found on the computer qualified as child pornography";
- The expert would "not be able to remember the specifics of the information [on the hard drive] without taking the hard drive from the sheriff's department";
- The "mirror image" would not contain all of the data that is actually on the hard drive, particularly files that have "been ordered damaged or erased";

Additionally,

- The expert would have to consult with another expert to determine whether images found on the computer, if any, were child pornography.
- If the expert were asked a question by counsel, the expert would have to return to the Sheriff's Department for follow-up.

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[1] Specifically, the expert testified that the task of analyzing the hard drive is "very labor intensive." The expert testified that the support personnel were necessary to help the expert "catalog the information which is on the hard drive, and to understand the creation dates, the time series, help [the expert] create the time series and do an analysis on that."

- The State's requested procedure would increase the risk of miscalculation.
- By requiring the defense expert to appear at the government facility for purposes of the evaluation, the defendant would have to reveal the identity of his expert before the State completed its discovery obligations.
- There is a "real danger" that the State could determine what the defense expert has done even before the defendant discloses a report.
- The defendant would be forced to involuntarily disclose the identity of and information of the analysis performed by experts that the defendant does not intend to use.

The trial court granted Mr. Allen's Motion to Compel. *See State v. Richard Allen Butler*, No. E2004-00359-CCA-R9-CD, 2005 WL 735080, *3 (Tenn.Crim.App. March 30, 2005). The trial court issued a protective order on December 9, 2003 requiring the State to disclose of a mirror image copy of the computer hard drive to defense counsel. *Id.*

On December 23, 2003, Mr. Allen filed a Renewed Motion to Suppress as a result of the State's continued refusal to disclose the computer data. On January 5, 2004, the trial court issued a second protective order requiring disclosure of a mirror image copy of the computer hard drive. *State v. Richard Allen Butler*, No. E2004-00359-CCA-R9-CD, 2005 WL 735080, *3 (Tenn.Crim.App. March 30, 2005).

Upon interlocutory review, the Tennessee Court of Criminal Appeals found the trial court's protective orders "reasonable and appropriate, especially given Allen's computer expert's testimony with respect to

the extensive and exhaustive work entailed in his examination of Allen's computer hard drive." *Id.* at *11. That court affirmed the order of the trial court.

After the Tennessee Court of Criminal Appeals affirmance of the trial court's two previous protective orders, the State still refused to disclose the mirror image.

On October 4, 2006, Mr. Allen filed a "Second Renewed Motion to Suppress." In that motion, Mr. Allen noted that "[m]uch time ha[d] passed since March 30, 2005" and that the State continued to refuse to comply with the orders of the trial court and of [the Tennessee Court of Criminal Appeals] this Court. Mr. Allen again requested suppression of the evidence.

On October 6, 2006, the State, for the first time, responded to the Second Renewed Motion to Suppress. In that response, the State asserted that the discovery disclosure ordered by the trial court would violate the "Adam Walsh Act (citing 18 U.S.C. § 3509(m)]. Congress passed the Adam Walsh passed on July 27, 2006.

On November 29, 2006, the trial court entered yet another protective order "detailing the discovery of all evidence held against Re'Licka Allen." In that order, the court stated:

The State has continued to refuse to provide Allen with an independent examination of the evidence against him. The State has persisted in allowing Allen access to his hard drive and other evidence only while it is under the 'custody and control' of the Sheriff's Department, despite the fact that the Court of Criminal Appeals found this Court's January 5, 2005 Order to be 'reasonable and appropriate.'

Butler, No. E2004-00359-CCA-R9-CD, 2005 Tenn. Crim.App. LEXIS 302, at *33. This Court will once again issue a Protective Order detailing the discovery of all evidence held against Re'Licka Allen.

On December 15, 2006, the State filed a "Motion to Reconsider and/or Motion to Clarify Order." The State again asserted that the recently enacted federal law prohibited disclosure of the mirror image (citing 18 U.S.C. § 3509(m).

A hearing was held on April 13, 2007, before the trial court. At that hearing, it was revealed that on the day before April 12, 2007, the State prosecutor alerted the federal authorities that the mirror image would be disclosed to the defense team. The prosecutor submitted that defense counsel, defense experts, even defense counsel's staff was at risk of prosecution for defense counsel's efforts to discharge his obligations to Mr. Allen. The State even submitted that Judge Leibowitz and her staff was at risk of prosecution:

> [Prosecutor] Allen: I can't make any promises about what would happen in – I mean there's dual jurisdiction in child pornography cases. They know that.
>
> The Court: What happens if my court reporter takes it?
>
> Mr. Allen: I – that – I'd file it as an exhibit with the Court. That would be great, Judge.
>
> The Court: What if my court reporter takes it? Is she subject to federal prosecution? Is the court clerk and Miss Phillips subject to federal prosecution?

> Mr. Allen: Judge, I *have absolute immunity in my prosecutorial functions*. This is a prosecutorial function. I don't know about anybody else.

(emphasis added). (Transcript of Proceedings)

The record also shows that it was Prosecutor Allen who contacted the United States Attorney's office:

> The Court: Did you notify the U.S. Attorneys?
>
> Mr. Allen: Yes, I did.

The trial court then issued an order suppressing the evidence stating:

> Then – then I want the disc lodged with the court reporter to be sealed and filed under seal. I hereby suppress the evidence in this case, and the State is free to appeal the suppression of evidence. I hereby suppress the evidence that's on the disc; let's put it like that. I don't know what other evidence the State wants to offer. So you need to decide if you plan to appeal that ruling – okay? – because I don't know anything else to do. And these guys don't need to go to jail. I'm not going to turn it over to them. The U.S. Attorney has been notified. They don't have absolute immunity. And on the other hand, it's been ordered several times because, in my view, its crucial to their defense. And so – the Court of Criminal Appeals has said so as well.
>
> . . .
>
> I'm suppressing the evidence based upon what Mr. Bell just said, that they cannot – they're totally chilled from being able to evaluate their own – evaluate the evidence against them. . . .

> I'm suppressing it because they can't get it under federal law because – you know, that's up to you whether you notified the U.S. Attorney because I think you – there are certain things you have to do under the law as well. But I don't see how you can proceed with a prosecution with regard to this, turn that over to them, and not – and them not be able to do what they need to do, which was what the whole issue was about.
>
> The disc had to be a mirror image because any manipulation of the computer disc changes the evidence, and that was the whole point. And they need to have their expert evaluate it. So how can they do that? They can't, not without violating the law.
>
> And as attorneys, they're standing up and saying to me, as officers of the court, they don't wish to violate the law, and I respect that.
>
> So I'm going to suppress the evidence as a result of that disc, but I'm locking it up so that we have that disc.
>
> (Transcript of Proceedings and oral order of Judge Leibowitz)

That same day, the trial court entered judgment. The judgment form states that the "Defendant's Renewed Motion to Suppress is granted . . ."

On May 9, 2007, the State timely filed its Notice of Appeal.

On February 12, 2009 the Tennessee Court of Criminal Appeals issued a (2) to (1) panel opinion in this case reversing the trial courts suppression of evidence and dismissal of the case. The Tennessee Court of Criminal Appeal, after reciting the facts in

great detail, *State of Tennessee v. Re'licka Dajuan Allen*, No. E2007-01018-CCA-R3-CD (February 12, 2009) (attached), analyzed the issue in two separate ways. The first was the risk of federal prosecution to defense counsel under 18 U.S.C. § 3509(m) ("Adam Walsh Act"). The second was the analysis of whether dismissal for failure to comply with Rule 16 was the proper remedy to take under the circumstances.

The Tennessee Court of Criminal Appeals found that there was not sufficient fear of criminal prosecution of the defense counsel in this case and the case should not have been dismissed for that reason for fear of federal prosecution under Section 3509(m) of the Adam Walsh Act. The Tennessee Court of Criminal Appeals also found that the dismissal as a sanction of a violation of Rule 16 discovery would not apply here because the state had (albeit grudgingly) agreed to turn the evidence over that was required by the trial court. The Tennessee Court of Criminal Appeals reversed the trial courts order suppressing the evidence, reinstated the indictment, and remanded the case for trial. *Id.*

The dissenting judge on the panel opined that the State was in bad faith for failing to refuse in under at least three (3) different orders to provide the discovery, and for waiting a period of time of over two and half years. The dissenting judge opined that the majority opinion of the panel had overstepped its authority in requiring the trial court to exhaust all other remedies before using the extreme remedy of suppressing evidence and dismissing the case under Tennessee Rule of Criminal Procedure Rule 16. The dissenting judge stated:

> it is my opinion that the majority opinion exceeds this Court's authority by requiring that the trial

> court first exhaust all other authority before finding that it acted within its discretion under Rule 16 by suppressing the evidence.

State of Tennessee v. Re'licka Dajuan Allen, No. E2007-01018-CCA-R3-CD (February 12, 2009) (McLin, J., dissenting).

On February 23, 2009, the petitioner filed a Petition for Rehearing to the Tennessee Court of Criminal Appeals. In that petition, it was once again argued that there was a jeopardy that existed and criminal exposure on behalf of the defense counsel and staff by the state's providing the disk which had already been required by the trial court. On March 9, 2009, the Tennessee Court of Criminal Appeals denied the appellant's Motion to Rehear before it.

On June 10, 2009, Petitioner filed a Rule 11 Application for Permission to Appeal in the Tennessee Supreme Court. On August 17, 2009, that Petition was denied.

This application followed thereafter.

REASONS FOR GRANTING THE WRIT

Whether the passage of the Adam Walsh Act, which made possession of child internet pornography electronic data by defense counsel illegal, violated the defendant's rights under the Fifth and Sixth Amendments of the United States Constitution.

REASONS FOR REVIEW

This case creates a clear "Hobson's Choice" between Petitioner's rights under the United States Constitution Fifth and Sixth Amendments and the federal prohibitions for defense counsel to obtain and possess discovery of alleged internet child pornography.

The core of this Petition is the "Hobson's choice" given Petitioner and Petitioner's counsel. Petitioner's choice is to either have counsel properly investigate the State's proof or, instead, comply with federal law. However, the undersigned respectfully submits that the undersigned may not do *both*. Each mutually exclusive option available to counsel is addressed below.

A. The Duty of Defense Counsel

The undersigned could choose to properly investigate Mr. Allen's case. Counsel has an undeniable affirmative duty to investigate the contents of the seized computer and hard drive. Specifically, the ABA Standards for Criminal Justice,

Defense Function Standard 4-4.1 states:

> (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.[2]

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[2] The United States Supreme Court advocated the use of the ABA Standards for Criminal Justice as a "guide" to determining whether counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The Tennessee Supreme Court also favors ABA Standards for Criminal Justice as a guide for determining whether counsel was effective. *Baxter v. Rose*, 523 S.W.2d 930,

To fail to fully and adequately investigate the case would be contrary to even the minimal the American Criminal Justice System requires of criminal defense counsel. It would also be a violation of Petitioner's rights under the United States Constitution, Sixth Amendment.

Thus, even if Mr. Allen were to instruct counsel that Mr. Allen wished to negotiate a plea bargain, counsel could not ethically advise Mr. Allen on whether to enter the plea bargain and the reasonableness of the terms of the plea bargain. Counsel certainly could not ethically advise Mr. Allen to accept any factual basis constituting the elements of a crime without evaluating the disc, which allegedly contains all of the evidence against Mr. Allen.

B. The Imminent Threat of Criminal Prosecution

Petitioner agrees with the State of Tennessee insofar as federal law prohibits the trial court and defense counsel from possessing and disseminating child pornography. *See* State's Application for Interlocutory Appeal (resulting in *State v. Richard Allen Butler*, No. E2004-00359-CCA-R9-CD, 2005 wl 735080, *12-13 (Tenn.Crim.App. March 30, 2005)); *State v. Re'Licka Dajuan Allen*, No. E2007-01018-CCA-R3-CD, 2009 wl 348555, at *6 (Tenn.Crim.App. Feb. 12, 2009) (State argued that "conducting discovery in violation of the act could subject defense counsel to federal prosecution for possession of child pornography"). As the State has submitted, "the Adam Walsh Child Protection and Safety Act of 2006" [hereinafter "the Act"] "unequivocally bans the dis-

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932 (Tenn. 1975); *State v. Cooper*, 847 S.W.2d 521, 531 (Tenn. Crim.App. 1992).

tribution of child pornography to defense counsel during litigation." [Vol. I, p. 36].

In 2006, Congress passed 18 U.S.C. § 3509(m):

> **(m) Prohibition on reproduction of child pornography.—**
>
> **(1)** In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.
>
> **(2)(A)** Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.
>
> **(B)** For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

18 U.S.C.A. § 3509 (amended 2006).

The State of Tennessee has previously asserted that it has always been a violation of federal law to possess or distribute child pornography, citing 42

U.S.C. § 14071(a)(3)(A)(viii) (2003).[3] Brief of Appellant at p. 15. According to the State, the undersigned would have been in violation of federal law even if the State had complied with the initial discovery orders. Therefore, the State posits that Judge Leibowitz should not have suppressed the evidence because of the State's insistence that the Adam Walsh Act would have been violated; or because the prosecutor alerted the federal authorities that the disclosure was scheduled to occur.

Before the Adam Walsh Act, federal courts were divided on the issue of the possession of potential internet child pornography by criminal defense counsel, depending on the facts of a particular case, as to the disposition of discovery issues presented in this case. *United States v. Kimbrough*, 69 F.3d 723, 731 (5th Cir. 1995) ("[c]hild pornography is illegal contraband;" thus, Rule 16 does not provide that "such contraband can be distributed to, or copied by, the defense" and District Court did not abuse its discretion in denying defendant copies of the discovery); *United States v. Horn*, 187 F.3d 781, 792 (8th Cir. 1999) (upholding the District Court's requirement that the discovery be reviewed at a government facility); *Compare United States v. Hill*, 322 F.Supp.2d 1081, 1091 (C.D.Cal. 2004) ("defendant will be se-

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[3] It is unclear why the State chose to cite 42 U.S.C. § 14071. That provision pertains to the federal equivalent of Tennessee's Sex Offender Registration Act. The specific provision cited by the State, *i.e.*, 42 U.S.C. § 14071(a)(3)(A)(viii), contains only a definition of crimes that would subject a person to the registration requirements as including child pornography crimes. 42 U.S.C. § 14071(a)(3)(A)(viii). The provision cross references the reader to the actual statutes that criminalize the conduct at issue. 42 U.S.C. § 1407(a)(3)(A)(viii) (citing 18 U.S.C. §§ 2251, 2252, and 2252A).

riously prejudiced if his expert and counsel do not have copies of the materials," ordering disclosure of copies to defense counsel); *United States v. Fabrizio*, 341 F.Supp. 47 (D.Mass. 2004) (ordering disclosure of copies of images).

Significantly, counsel is able to identify only one "pre-Adam Walsh Act" authority that suggests the possession of child pornography to defense counsel subjects defense counsel to criminal liability. In *Rogers v. State*, 113 S.W.3d 452, 458 (Tex.Ct.App. 2003), an Assistant United States Attorney ("AUSA") contacted "defense counsel and informed him that the AUSA believed that obtaining and retaining the mirror image would be grounds for federal prosecution because federal law did not contain an exception for discovery in criminal cases." *Rogers*, 113 S.W.2d at 458. Thus, even before the passage of 18 U.S.C. § 3509(m), the Department of Justice (or at least one rogue prosecutor) took the position that it was a criminal act for defense counsel to possess the evidence in furtherance of client representation.

However, it is significant that there are no pre-Adam Walsh Act cases known to counsel where defense counsel *was* prosecuted or otherwise subjected to criminal liability.

The Adam Walsh Act (18 U.S.C. 3509(m)) provision appears to confirm the holdings of *Kimbrough* and *Horn*, *supra*. More importantly, 18 U.S.C. § 3509(m)(1) appears to ***specifically prohibit*** possession of child pornography, even by defense counsel and experts, outside of a government facility. *See United States v. O'Rourke*, 470 F.Supp.2d 1049, 1053-54 (D.Ariz. 2007) (statute distinguishes "court" from "attorney;" therefore, defense counsel is not permitted possession of the hard drive as an "officer of the court").

As with 18 U.S.C. §§ 2251, 2252, and 2252A, discovery issues pertaining to 18 U.S.C. § 3509(m) have been hotly contested with mixed results. The prohibition in the fact is not without some leeway. Where a defendant has shown an analysis at the government facility would be cost prohibitive; doubt as to the reliability of expert equipment after having been moved to a government facility; and the expert's "personal ability to analyze the evidence thoroughly and carefully would be compromised to such a degree that he 'wouldn't be able to service the client or the attorney' effectively" if forced to undertake the evaluation at a government facility, the statute itself requires disclosure. *United States v. Knellinger*, 471 F.Supp.2d 640, 647-48 (E.D.Va. 2007).

The *Knellinger* opinion was not based on constitutional infractions, rather on the "safety valve" of the Adam Walsh Act, *i.e.*, the requirement that the government provide defense experts "ample opportunity" to evaluate the evidence. *Id.*

However, where the defendant fails to show such facts as shown in *Knellinger*, the defendant is found to have been given "ample opportunity" where the government provides the defendant ample access to the evidence at a government facility. *See O'Rourke*, 470 F.Supp.2d at 1057-58 (where defendant raised issues of inadequate internet access and "malware" but failed to show the effect of the alleged deficiencies and did not raise those issues during the evaluation, ample opportunity was provided); *United States v. Flinn*, 521 F.Supp.2d 1097 (E.D.Cal. 2007) (criticizing *Knellinger*, but nevertheless finding that the defendant failed to show any "case specific" prejudice where the expert testified that the government's hardware and software were adequate; and offered

only a "guesstimate" as to the extraordinary cost the defendant would bear if the expert conducted his evaluation in the government's facility; however, if the defendant could present any "case specific" deficiencies, the court would reconsider); *United States v. Doane*, 501 F.Supp.2d 897, 902 (E.D.Ky. 2007) (defense counsel conceded that the caselaw did not support his position).

Mr. Allen submits that this case is analogous to *Knellinger*; and the trial court specifically found facts in support of Mr. Allen's submission.

Nevertheless, the operative question in this case (*i.e.*, whether defense counsel, experts, and staff are subject to federal prosecution) remains unanswered.[4] According to the United States District Court for the Eastern District of California and the United States District Court for the District of Arizona, defense counsel presumably would be subject to federal prosecution. *See Flinn*, 521 F.Supp.2d 1097; *O'Rourke*, 470 F.Supp.2d 1049.

Thus, trial court's options were limited. The trial court could require Mr. Allen to forego an adequate expert analysis; trial court could require counsel to take possession of the mirror image and become the "guinea pigs" of post-Adam Walsh Act federal pros-

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[4] In all fairness, counsel has been unable to identify any cases where counsel for the defendants in *Knellinger*, 471 F.Supp.2d 640; or *Boyd*, 158 P.3d 54 were prosecuted. However, counsel for defendant *Knellinger* took possession pursuant to a federal court order. Further, while the *Knellinger* decision could contemplate the legality of limited possession by defense counsel and experts, the *Flinn* and *O'Rourke* decisions certainly do not. Also, in *Boyd* there is no indication that the state prosecutors stooped to attempting to initiate a federal prosecution of defense counsel.

ecutions; or trial Court could dismiss the case. The trial Court rightfully chose to dismiss the case.

The majority of the Court of Criminal Appeals panel has correctly observed that the Act "does not criminalize any conduct that was not already illegal under" 18 U.S.C. §§ 2251, 2252, and 2252A "long before the passage of Section 3509." *State v. Re'Licka Dajuan Allen*, No. E2007-01018-CCA-R3-CD, 2009 wl 348555, at *6 (Tenn.Crim.App. Feb. 12, 2009). Nevertheless, Mr. Allen concedes that the State was correct in its implied assertion that the passage of 18 U.S.C. § 3509(m) *clarifies that defense lawyers and experts are not immune from prosecution* if child pornography is removed from the custody of the Court or of the government. 18 U.S.C. § 3509(m)(1).

The threat of criminal prosecution is compounded by the fact that the ***Assistant District Attorney informed the Unites States Attorney's office of its potential disclosure of computerized data to defense counsel.***

Despite the clear interpretation of 18 U.S.C. § 3509(m) that possession of these materials by defense counsel was illegal under Federal law, the majority of the Tennessee Court of Criminal Appeals panel stated:

> [w]e have been unable to find a single state or federal criminal prosecution of defense counsel anywhere in the country based on counsel's possession of child pornography as part of a state's discovery procedures. We think the likelihood of federal prosecution of defense counsel in this case for possession of child pornography is remote at best . . .

State v. Re'Licka Dajuan Allen, No. E2007-01018-CCA-R3-CD, 2009 wl 348555, at *7 (Tenn.Crim.App.

Feb. 12, 2009). Mr. Allen, with the utmost respect, disagrees with the Tennessee Court of Criminal Appeals' holding in this case.

Mr. Allen respectfully submits that the proper inquiry is not to evaluate the chance or risk of defense counsel "getting caught" or being punished for transgressing the federal criminal code. The proper inquiry *should be whether defense counsel is required to violate the law in the first place.*

If defense counsel must violate the law in conducting his investigation, defense counsel subjects himself to discipline by the Board of Professional Responsibility, *See* RPC Rule 4.4(a); to a potential civil action by a child pornography victim or even a person whose image was manipulated into constitutionally protected virtual pornography, *See Jane Doe, et. al. v. Dean Boland*, No. 1:07cv2787 (N.D. Ohio, filed Sept. 14, 2007); and would violate the ABA Standards for Criminal Justice, Defense Function Standard 4-4.2 (prohibiting defense counsel from obtaining evidence illegally).

These consequences remain even the Tennessee Court of Criminal Appeals assessment of the risk of prosecution is correct. Counsel would be subjected to these collateral consequences *even if federal authorities granted defense counsel and defense experts immunity* (which they have not). Mr. Allen respectfully submits that it is intolerable to force an attorney to violate the criminal law if he is to effectively represent a client pursuant to the client's constitutional rights.

Mr. Allen respectfully submits that the threat of prosecution of the undersigned is *very real* and is much more than an imagined perception that the

defense is attempting to raise to forestall this prosecution.

Mr. Allen directs this Court's attention to the prosecution of Attorney Dean Boland. The Ohio Supreme Court summarized the federal prosecution of Attorney Boland as follows: on June 24, 2005, the Federal Bureau of Investigation executed a search warrant at Boland's home in connection with two unrelated child pornography cases – *State v. Sparks*, Summit Cty. Common Pleas No. CR 02-12-3669, and *United States v. Schreck*, N.D.Okla. No. 03-CR-43-H. In those cases, Boland had testified as an expert and allegedly prepared and displayed exhibits that depicted identifiable minors who appeared to be engaged in sexually explicit conduct. Among the items seized by the FBI were CDs containing copies of the state's evidence against Brady, Boland's laptop computer, and approximately 50 digital image exhibits that Boland was preparing as exhibits for Brady's trial. *State v. Brady*, 894 N.E.2d 671, 673 (Ohio 2008).[5]

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[5] The Ohio Supreme Court reversed the dismissal of Mr. Brady's case because, contrary to Mr. Boland's testimony at trial and counsel's argument to the trial court, Mr. Boland at oral argument before the Ohio Supreme Court "conceded that he could analyze the state's evidence at the prosecutor's office." *Brady*, 894 N.E.2d at 679. In this case, Mr. Allen's expert did not concede that he could examine and analyze the state's evidence at the prosecutor's office. To the contrary:

> Herbert Mack, Allen's expert computer witness, described in detail the various programs and viruses by which material can be both deliberately and inadvertently downloaded into a computer and estimated that it would take him approximately one week of intensive twelve – to fourteen-hour days to complete an examination of Allen's computer hard drive. He testified he would probably require the assistance of support personnel from his office

Because counsel can either effectively represent Mr. Allen and ensure that Mr. Allen receives a fair trial and a meaningful opportunity to present a defense as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I §§ 8 and 9 of the Tennessee Constitution, **or** counsel can comply with the federal criminal code, ethical obligations, and ABA Standards, **but** not both, Mr. Allen respectfully requests that this Court hear this matter.

C. The Necessity of Possession of the Computer Data in its Original Form.

The analysis of the computer data is fundamentally necessary to counsel's ability to perform as Mr. Allen's attorney and to preserve Mr. Allen's constitutional rights. The necessity of a complete expert analysis of the disc are particularly apparent in light of the United States Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-50 (2002) (holding that a ban on *virtual* child pornography violates the First Amendment of the United States Constitution).

Nevertheless, since the inception of this case, the State of Tennessee has insisted that the courts impose an unreasonable restriction on Mr. Allen's

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> and, in addition, would need to consult regularly with counsel with respect to whether any sexually explicit files he found on the computer qualified as child pornography. He said that, given the large number of images allegedly contained on the computer, he would not be able to remember the specifics of the information without taking the computer hard derived from the sheriff's department.

State v. Richard Allen Butler, No. E2004-00359-CCA-R9-CD, 2005 wl 735080 at *3 (Tenn.Crim.App. March 30, 2005)

access to the fundamental evidence, *i.e.*, mandating that Mr. Allen only have access to the evidence in the confines of a State facility.

In this case, multiple hearings have been held and experts have testified on the very issue of the necessity of the disclosure of the evidence and the reasonableness of the State's mandated restriction on access to the evidence. After hearing all of the proof and arguments from both parties, the trial court on more than three separate occasions ordered the State to disclose a mirror image of the hard drive. *State v. Richard Allen Butler*, No. E2004-00359-CCA-R9-CD, 2005 wl 735080 (Tenn.Crim.App. March 30, 2005) (court issued protective orders on December 9, 2003 and January 5, 2004); *State v. Re'Licka Dajuan Allen*, No. E2007-01018-CCA-R3-CD, 2009 wl 348555, pp. 3-4 (Tenn.Crim.App. Feb. 12, 2009) (quoting the trial court's third order).

The results of this extensive and thorough litigation have left no doubt that the mirror image is essential to Mr. Allen's defense, Mr. Allen is entitled to the mirror image, and Mr. Allen's attorneys and expert witnesses must take possession of the disc in order to effectively represent Mr. Allen. To fail to obtain this data for analysis would be to vitiate Petitioner's right to effective assistance of counsel under the United States Constitution, Sixth Amendment, and his right to prepare a defense, *Holmes v. South Carolina*, 547 U.S.C. 316 (2006)

Mr. Allen submits that where computer images are at issue, the outcome of child pornography cases rests almost exclusively upon expert analysis of the computer hard drive. When presented with a computer hard drive, few have the skills and training necessary

to find a specific computer image;[6] to determine when and how the image was recorded to the hard drive; to determine whether the image is an actual depiction of real people; and/or to determine the age of the people depicted. The trial court recognized that fact in responding to one of the prosecutor's objection: "I would ordinarily agree with you, General, but under the circumstances that this is a very different world than most of us talk about, I would like him to lay the foundation so that we all understand what we're talking about. And I'm beginning to understand better." Petitioner submits that the expert evaluation is necessary to determine:

a. Whether "virtual or real minors are contained in the computer memory;

b. The age of the individuals portrayed in the images;

c. The exact behavior of the actors portrayed in the images;

d. The potential source of the images;

e. The date and time when the images were stored;

f. The date and time the images were accessed;

g. The date and time the images were last altered;

h. The potential people with access to the computer at certain times;

i. Whether the hard drive has been altered;

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[6] The necessity of having an expert locate files is particularly evident where "damaged" and "erased" files should rightfully be evaluated.

j. Potential internet access and usage;

k. How computer files were accessed and formatted;

l. And other related technical issues, including any forensic software that was used against the hard drive.

These considerations are of vital importance in "computer image" child pornography cases for a variety of reasons, including but not limited to the two discussed below.

First, Petitioner was charged with violations of T.C.A. §§ 39-17-1003 and 1004. Both require that the contraband be *knowingly* possessed and/or distributed. T.C.A. §§ 39-17-1003, 1004. These crimes are not strict liability crimes. Thus, Petitioner must have knowingly downloaded, distributed, and/or (at the very least) viewed the contraband in order to violate the statute.

The mere existence of the image on the computer hard drive does not indicate that a defendant knowingly possessed or distributed the contraband. Files can easily be present and/or appear on a computer hard drive without the knowledge of the owner or user of the computer.

Part of the forensic computer expert's function is to determine the capabilities of the tools used for downloading data onto the computer and evaluate the "logs" of specific tools to determine how a particular file came to appear on the hard drive. The forensic expert can also determine "whether or not [an] individual has access" to a particular site.

These functions assist the expert in determining whether the file was knowingly downloaded onto the computer as opposed to

- "pop[ping] up" on the computer without the user's knowledge,
- appearing from opening an unanticipated e-mail,
- resulting from an external website "putting a program" on the computer, without the user "having a clue" that information is downloaded on the computer,
- resulting from unintended operations where a user "asks" the computer to download a type of file and the computer downloads all files meeting the criteria without the user's knowledge that some of the files may contain contraband,
- resulting from "Trojan horse" programs where the program "masquerades itself as some other program and does whatever the program writer . . . wants it to do," including downloading contraband unbeknownst to the user,
- resulting from "worm" programs, which are a class of virus where spam e-mail enters a computer and e-mails data to the contacts in the computer's address book,
- resulting from "Mask" programs where the image purports to be an innocent image, but in fact contains sexually explicit material,
- resulting from Spyware which tracks a computer user's activity and exposes the user to SPAM,

- resulting from a third party program allowing the third party to "do anything that [the user can] do" on the computer.

Because of the specialized knowledge necessary to evaluate the time, manner, origin, *etc.* of the downloaded data, and because of the multiple means by which data can be downloaded onto a computer without the user's knowledge, the expert evaluation is *essential* to contend with the State's allegation that Petitioner "knowingly" possessed or distributed the images at issue in this case.

Second, assuming that the images were knowingly possessed and/or distributed, an expert is essential to determine whether those images are *contraband.* The United States Supreme Court has specifically held that virtual images of children, images of adults who appear to be children, and/or images altered so that an adult appears to be a child are specifically protected by the First Amendment to the United States Constitution. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Mr. Allen may not be convicted for possession of images identified in *Free Speech Coalition.*[7] *Id.*

The images at issue must be extracted from Mr. Allen's hard drive before a determination of whether the depiction is a real child can even be made. Then, the defense expert would have to consult with another expert in order to determine whether a real child is depicted in the image.

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[7] The trial court did not consider the question of whether innocent images of *real* children "morphed" so that the image appears to depict a child engaged in sexually explicit conduct is protected by the First Amendment. *Free Speech Coalition*, 535 U.S. at 242.

Without the disclosure of the mirror image and the resulting expert evaluation of the mirror image, Mr. Allen is wholly unable to defend this case on the basis that Mr. Allen did not download and/or view the images; and/or that the images are images protected by the First Amendment to the United States Constitution. *See Ashcroft*, 535 U.S. at 256. These are *the fundamental* defenses available to Mr. Allen in this prosecution. *See Id.*

Thus, the impediments to discovery "hindered trial preparation and defense at trial" to an all-encompassing degree. *State v. Thomas Dee Huskey,* No. E1999-00438-CCA-R3-CD, 2002 WL 140059, at *56 (Tenn. Crim.App. June 28, 2002) (unpublished) (attached) (citation omitted). There is no "reasonable alternative" to permitting the requested disclosure. *Smith*, 926 S.W.2d at 270 (citing *House*, 743 S.W.2d at 147).

The State suggested that Mr. Allen be required to conduct his analysis in the Sheriff's Department. The State's suggested alternative is inadequate.

D. Constitutional Rights

Many state courts have held that the defendant has the **right** to discover the precise information the State refused to disclose in this case. *State v. Boyd*, 158 P.3d 54, 59 (Wash. 2007) ("[t]o adopt the State's position is to restrict the defendant's right to potentially exculpatory evidence on the State's mere allegation that the evidence involves contraband"); *State v. Second Judicial District Court*, 89 P.3d 663, 666 (Nev. 2004) (*per curiam*) (although there is no exception to a violation of Nevada's child pornography statute applicable to defense attorneys, "the United States Constitution and its amendments protect a defendant's ability to adequately prepare for

trial"); *Cervantes v. Cates*, 76 P.3d 449 (Ariz.App. 2004) (permitting defense counsel and expert to review images at jail under supervision of detective insufficient under Arizona rules of discovery); *Westerfield v. Superior Court*, 121 Cal.Rptr.2d 402, 404 (Cal.App. 2002) (preventing the defendant from having copies of the images violate defendant's right to a speedy trial and effective assistance of counsel); *State v. Richard Allen Butler*, No. E2004-00359-CCA-R9-CD, 2005 WL 735080, *11 (Tenn.Crim.App. March 30, 2005) ("[w]e find the reasoning of the *Westerfield* and *Cervantes* courts to be persuasive . . ."); *but see Minnesota v. Wells*, No. A06-1942, 2007 WL 2769686 (Minn.App. Sept. 25, 2007) (unpublished attached) (where there was no evidence presented that defendant was prejudiced, trial court did not abuse discretion in holding that public policy weighed against dissemination of contraband).

In fact, these courts have found various constitutional violations when presented with facts that were almost identical (or at least closely analogous) to the facts of this case. For example:

- The defense expert testified that, due to numerous methods, images could be present on the hard drive without the user or owner's knowledge. [Vol. II, pp. 46-55]. Such would negate the "knowing" element of the crimes charged. Further, collaboration between defense experts would be necessary to determine whether the images were even child pornography. Denying access to the means that would reveal such information inhibits a defendant's rights to effective assistance of counsel, to access to evidence, and to receive ***Brady* material** "on the State's mere allegation that the

evidence involves contraband." *Boyd*, 158 P.3d at 59-61; *See also Second Judicial District Court*, 89 P.3d at 638 (finding that **effective assistance of counsel** is hindered by the failure to disclose a videotape but noting that the videotape "might contain information favorable to" the defendant and that the information is material).

- The *Westerfield* Court found that "requiring the defense to view – and apparently commit to memory – the 'thousands' of images at the computer crimes office obviously impacts Westerfield's right to **effective assistance of counsel and his right to a speedy trial**." *Westerfield*, 121 Cal.Rptr.2d at 405. In this case, these rights are even more egregiously impacted as the expert testified "that, given the large number of images allegedly contained on the computer, he would *not be able* to remember the specifics of the information without taking the computer hard drive from the sheriff's department." *State v. Richard Allen Butler*, No. E2004-00359-CCA-R9-CD, 2005 WL 735080, *2 (Tenn.Crim.App. March 30, 2005) (emphasis added).

- Where defense counsel sought to slow down and enhance video and audio tracks in order to show absence of defendant in videotapes of adults having sex with a child, "denying defense counsel copies of the child pornography hinders the **defendant's right to effective assistance of counsel**." *Second Judicial District Court*, 89 P.3d at 668 (noting that the defendant's constitutional rights "trump" any discovery prohibition). In this case, "extensive

> and exhaustive work" is required to demonstrate Mr. Allen's absence, lack of knowledge, and/or that the images are not child pornography. *State v. Richard Allen Butler*, No. E2004-00359-CCA-R9-CD, 2005 WL 735080, *11 (Tenn.Crim.App. March 30, 2005);

Mr. Allen submits that to deprive Mr. Allen of an opportunity to conduct the appropriate expert analysis is to deprive Mr. Allen of his basic constitutional rights. Indeed, Mr. Allen was wholly deprived of any opportunity to present a defense. If Defendant was charged with possession of narcotics, we would have the authority to have the narcotics analyzed. Just because it is child porn makes such independent no less important.

The State has continued to fail to offer any alternative that would resolve the constitutional violations that would result from requiring Petitioner's expert to conduct his evaluation at the sheriff's department. The requirement that Petitioners conduct his expert evaluation at the sheriff's department has been found *in this case* to fail to provide adequate constitutional protection to accused citizens. Likewise, other courts have made similar findings in almost identical cases.

CONCLUSION

It has now been six years since the prosecution of this case began. Defense counsel has yet to receive or review the discovery in the possession of the State in this case.[8] For years this was because the State refused and continues to refuse the disputed materials in compliance with repeated Orders of the trial

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[8] The discovery materials were filed with the criminal judge, not ever with the defense counsel.

court and the Tennessee Court of Criminal Appeals. More recently, it is because there is a very real fear by defense counsel that possession of this discovery could lead to a subsequent Federal prosecution against the lawyer, the expert, or anyone associated with the defense team. This fear is particularly acute in light of the fact that the Assistant District Attorney here referred the matter to the Federal prosecutors of its potential disclosure of these materials to undersigned counsel.

Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution are accordingly being violated.

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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November 16, 2009

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

[Filed AUG 17, 2009]

Criminal Court for Knox County No. 77455
No. E2007-01018-SC-R11-CD

STATE OF TENNESSEE,

v.

RE'LICKA DAJUAN ALLEN,

ORDER

Upon consideration of the application for permission to appeal of Re'Licka Dajuan Allen, and the record before us, the application is denied.

PER CURIAM

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE
March 26, 2008 Session

[Filed FEB 12, 2009]

Direct Appeal from the Criminal Court
for Knox County
No. 77455 Mary Beth Leibowitz, Judge
No. E2007-01018-CCA-R3-CD

STATE OF TENNESSEE,

v.

RE'LICKA DAJUAN ALLEN,

JUDGMENT

Came the Appellant, Re'Licka DuJuan Allen by counsel and also came the Attorney General on behalf of the State, and this case was heard on the record on appeal from the Criminal Court of Knox County; and upon consideration thereof, this Court is of the opinion that there is error in the judgment of the trial court.

It is, therefore, ordered and adjudged by this Court that the judgment of the trial court is reversed and the case is remanded to the Criminal Court of Knox County for execution of the judgment of that Court and for collection of costs accrued below.

Because is appears to the Court that Appellant, Re'Licka DuJuan Allen, is indigent, costs will be paid by the State.

Per Curiam
Smith, Wedemeyer

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE
March 26, 2008 Session

[Filed FEB 12, 2009]

Direct Appeal from the Criminal Court for Knox County
No. 77455 Mary Beth Leibowitz, Judge
No. E2007-01018-CCA-R3-CD

STATE OF TENNESSEE,

v.

RE'LICKA DAJUAN ALLEN,

Defendant, Re'Licka Dejuan Allen, was indicted on two counts of aggravated exploitation of a minor and one count of sexual exploitation of a minor. The State refused to comply with Defendant's requests for discovery by withholding the contents of Defendant's computer hard drive and other computer materials alleged to contain incriminating evidence. The State refused to disclose the requested discovery despite the trial court's issuance of two protective orders, the ruling of the appellate court on interlocutory appeal, and a third protective order by the trial court requiring disclosure. After a final hearing, the trial court suppressed the evidence and dismissed the indictment against Defendant. The State argues on appeal that the trial court erred in suppressing the evidence based upon the perceived threat of federal prosecution to defense counsel. Following our review of the parties' briefs, the record, and the applicable

law, we reverse the judgment of the trial court, reinstate the indictment and remand for trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, J., joined and J. C. McLin, J., dissenting.

James A.H. Bell, Knoxville, Tennessee, for the appellant. Re'Licka Dajuan Allen.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Kevin J. Allen, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

Defendant was charged in a three-count indictment alleging sexual and aggravated sexual exploitation of a minor stemming from the possession of child pornography. Defendant's case was consolidated with another case presented by the State on interlocutory appeal. The facts of Defendant's underlying offenses were summarized in the appellate court's opinion as follows:

> [The defendant] was charged by the Knox County Grand Jury on June 17, 2003, with one count of sexual exploitation of a minor for possessing materials that included a minor engaged in sexual activity, and with two counts of aggravated sexual exploitation of a minor for possessing, with the intent to transport and with the intent to distribute, materials that included a minor engaged in sexual activity, in violation of Ten-

> nessee Code Annotated section 39-17-1004. Both cases involved material located on Defendants' computers. In [the defendant's] case, the material was originally discovered by a computer repair technician at a store where [the defendant] had taken his computer for repair. The technician informed his manager of his discovery, and the manager in turn contacted Knox County law enforcement.

State v. Richard Allen Butler, No. E2004-00359-CCA-R9-CD, 2005 WL 735080, at *1 (Tenn. Crim. App., at Knoxville, Mar. 30, 2005) perm. *app. denied* (Tenn. Aug. 22, 2005), *abrogated by State v. Pickett*, 211 S.W.3d 696 (Tenn. Jan. 22, 2007).

After the charges were filed, Defendant filed a motion for discovery, which included a request that the State provide him with copies of the computer hard drive and other computer materials. The State refused Defendant's discovery request but offered instead to make Defendant's computer hard drive available for inspection at the Sheriff's Department. Thereafter, Defendant filed a motion to compel discovery. At a hearing on his motion to compel, Defendant's computer expert testified that simply being allowed access to Defendant's computer hard drive at the Sheriff's Department would not permit him to conduct a sufficient evaluation. The defense expert's testimony was summarized in this court's opinion as follows:

> In [Defendant's] case, a hearing on his motion to compel was held at which the State presented one witness, Carlton Bryant, an attorney employed at the Knox County Sheriff's Department. Bryant testified that his understanding of the law was that the sheriff's department could not allow counsel to take a

copy of the computer hard drive from the department because the sexual exploitation statute did not contain any exemption for defense counsel to be given child pornography. He said they would, however, accommodate counsel and counsel's computer experts by mirror-imaging the hard drive and allowing them to examine the copy while it remained in the "custody and control" of the department. He testified that they contemplated setting aside a conference room for that purpose and would arrange a schedule that was convenient for counsel and his experts.

Herbert Mack, [Defendant's] expert computer witness, described in detail the various programs and viruses by which material can be both deliberately and inadvertently downloaded into a computer and estimated that it would take him approximately one week of intensive twelve-to fourteen-hour days to complete an examination of [Defendant's] computer hard drive. He testified he would probably require the assistance of support personnel from his office and, in addition, would need to consult regularly with counsel with respect to whether any sexually explicit files he found on the computer qualified as child pornography. He said that, given the large number of images allegedly contained on the computer, he would not be able to remember the specifics of the information without taking the computer hard drive from the sheriff's department.

Mack expressed concern about working from a "mirror image" rather than the hard drive itself, testifying that the computer programs in existence did not create true mirror images:

> A. Well, the question-what I heard before was providing me with a mirror image. Okay. If we're talking about me working on the original com-

puter, no, I don't need another computer as long as I can, you know, load my tools and take my tools off. If what you're going to give me is a mirror image, my concern there is that I'm not getting all of the data that's there.

Q. And why is that? If it's a mirror image wouldn't you just get everything that's in the mirror?

A. No, sir.

Q. Why not?

A. A mirror image is a misnomer, okay. The computer programs that you have right now, okay. are for the purpose of recovering good data. Okay. So if a file has been ordered damaged or erased it's not going to be on the image.

Mack conceded that his examination of the actual hard drive would entail reconnecting the original personal computer equipment, turning the computer on, and loading his software file-searching tools, and he agreed that in the process of booting up the Windows operating system the contents of the hard drive would be changed. However, according to his testimony, booting the computer would not alter either the file creation date or last accessed date of the images in question. Mack testified he was familiar with "EnCase," a forensic examination software utility available exclusively to law enforcement, but he was not aware that it had been approved by several federal district and appellate courts as a "non-invasive forensic examination tool."

Id. at *2-3.

In addition to the testimony above, Mack further testified that the risk of transmitting inaccurate information was high if defense counsel was dependent upon Mack to tell defense counsel what he had seen on a computer disk image. Mack stated that there was an increased risk of disclosing non-discoverable information because the State's expert would be able to determine what tools had been run on Defendant's computer hard drive and what information had been recovered before Defendant was obligated to disclose its expert report. Mack also stated that Defendant would have no choice but to involuntarily disclose information that was not subject to discovery and that Defendant did not intend to use at trial.

At the conclusion of the hearing on the motion to compel, the trial court issued a protective order requiring disclosure of a mirror image of the computer hard drive. However, the State refused to comply. Defendant filed a "Renewed Motion to Suppress" as a result of the State's noncompliance with the court's order. In response, the trial court issued a second protective order requiring disclosure of the discovery materials to Defendant.

After the issuance of the second protective order by the trial court, the State filed an interlocutory appeal under Rule 9 of the Tennessee Rules of Appellate Procedure. The State argued that compliance with the discovery request violated Tennessee sexual exploitation statutes. At the conclusion of the interlocutory appeal, this court found that the trial court did not err in ordering the State to comply with Defendant's discovery request.

> [We] conclude that the possession, copying, or distribution of child pornographic materials does

> not constitute a violation of Tennessee's sexual exploitation of a minor statutes so long as it occurs in the context of the prosecution or defense of a case under the statute. . . . [T]he trial court[ ] entered protective orders to keep the evidence secure and to confine its dissemination to defense counsel and counsel's agents and employees in the preparation of their defense. We find these orders reasonable and appropriate. especially given [Defendant's] computer expert's testimony with respect to the extensive and exhaustive work entailed in his examination of [Defendant's] computer hard drive. Accordingly, we conclude that the trial courts did not err in granting Defendant[s] motion to compel the production of the evidence.

Richard Allen Buller, 2005 WL 735080, at *11. This Court affirmed the trial court's issuance of the two previous protective orders. However, the State continued to deny Defendant's discovery request. Thereafter, Defendant filed a "Second Renewed Motion to Suppress," again requesting suppression of the evidence. The State filed a response to Defendant's motion and argued that enactment of an amendment to federal law, known as the "Adam Walsh Child Protection and Safety Act" ("the Adam Walsh Act"), now prevented the State from granting Defendant's discovery request to provide copied images of the alleged child pornography taken from Defendant's computer. The trial court entered a third protective order, which again instructed the State to provide copies of the discovery material requested by the defense. In its order, the court stated:

> In its March 30, 2005 decision, the Court of Criminal Appeals clearly contemplated the

State's proposal of mirror-imaging Defendant's hard drive and allowing counsel to examine the copy while it remained in the "custody and control" of the Sheriff s Department. *State v. Butler*, No. E2004-00359-CCA-R9-CD, 2005 Tenn. Crim. App. LEXIS 302, at *6 (Tenn. Crim. App. Mar. 30, 2005). The Court also considered the State's argument that the sexual exploitation statute provides no exception allowing possession of such material by defense counsel or experts. *Id* at *26. Despite taking these arguments under advisement, the court held "that the possession, copying, or distribution of child pornographic materials does not constitute a violation of Tennessee's exploitation of a minor statutes so long as it occurs in the context of the prosecution or *defense* of a case under the statute." *Id.* at *33 (emphasis added). The Court clearly stated that both *the Allen* and *Butler* Trial Courts' Protective Orders were "reasonable and appropriate" under Tenn. R. Crim. P. 16(a)(1)(C). *Id.* In upholding the *Butler* and *Allen* Orders, the Court specifically relied upon computer expert testimony detailing the extensive and exhausting work involved in examining a computer hard drive. *Id.*

The state has continued to refuse to provide [Defendant] with an independent examination of the evidence against him. The State has persisted in allowing [Defendant] access to his hard drive and other evidence only while it is under the "custody and control" of the Sheriff's Department, despite the fact that the Criminal Court of Appeals found this Court's . . . Order to be reasonable and appropriate. *Butler*, No. E2004-00359-CCA-R9-CD, 2005 Tenn. Crim. App. LEXIS 302, at *33.

In response to the issuance of the trial court's third protective order mandating disclosure of discovery, the State filed a "Motion to Reconsider and/or Motion to Clarify the Court's Protective Order." In this motion, the State argued that the enactment of the Adam Walsh Act "unequivocably bann[ed]" the distribution or dissemination of child pornography to defense counsel during litigation, thereby reversing the appellate court's ruling in *Butler* on the basis that the Adam Walsh Act, under the doctrine of federal preemption, superseded Tennessee criminal procedural rules governing discovery. Defendant filed a memorandum in response to the State's motion. In Defendant's response memorandum, Defendant detailed cases in other jurisdictions which held that the Adam Walsh Act did not preempt those States' discovery rules.

A hearing was held on the State's motion to reconsider. At the hearing, the State informed the court that it had contacted the U.S. Attorney's office, as it believed it was obligated to do, and disclosed that a copy of the mirror image of the computer hard drive would be provided to defense counsel and their experts. The State informed the court that defense counsel, any defense expert, as well as court staff and others could be at risk of federal prosecution for possession of child pornography in violation of the Adam Walsh Act if the discovery material was turned over to Defendant. At the hearing, the following exchange occurred between the trial court and the State:

[Prosecutor]: I'm here and ready, Judge. I can't make any promises about what would happen in – I mean there's dual juris-

diction in child pornography cases. They know that.

The Court: What happens if my court reporter takes it? Is she subject to federal prosecution? Is the court clerk and Miss Phillips subject to federal prosecution?

[Prosecutor]: Judge, I have absolute immunity in my prosecutorial functions. This is a prosecutorial function. I don't know about anybody else.

The Court: Well, there's another alternative. And that is because I have ordered this be turned over at least three times and the appellate court has too, I can suppress the evidence and you can appeal that to the appellate court and see if we can't get the appellate court to tell us how they'd like to approach these cases because the State of Tennessee is going to have to do something.

. . . .

[Prosecutor]: I'm here and ready to comply with the order, Judge, the initial order where you'd have me turn it over. We appealed that to the Court of Appeals and it came back down.

The Court: Yes, and they told you to turn it over, and I told you to turn it over.

[Prosecutor]: You re-ordered me, and then I filed a Motion to Reconsider based on the Adam Walsh case, and you haven't

ruled on the Adam Walsh case yet. Today is the day that you rule on Adam Walsh –

. . . .

The Court: Did you notify the U.S. Attorneys?

[Prosecutor]: Yes, I did.

The Court: Then – then I want the disc lodged with the court reporter to be sealed and filed under seal. I hereby suppress the evidence in this case, and the State is free to appeal the suppression of evidence. I hereby suppress the evidence that's on the disc; let's put it like that. I don't know what other evidence the State wants to offer . . . .

. . . .

The Court: Well, I'm suppressing the evidence based upon what Mr. Bell just said, that they cannot – they're totally chilled from being able to evaluate their own – evaluate the evidence against them.

[Prosecutor]: So you're suppressing it because I notified the U.S. Attorney that they were taking possession –

The Court: No. I'm suppressing it because they can't get it under federal law because – you know, that's up to you whether you notified the U.S. Attorney because I think you – there are certain things you have to do under the law as well. But I don't see how you can proceed with a prosecution with regard to this,

turn that over to them, and not – and them not be able to do what they need to do, which was what the whole issue was about.

The disc had to be a mirror image because any manipulation of the computer disc changes the evidence, and that was the whole point. And they need to have their expert evaluate it. So how can they do that? They can't not without violating the law.

And as attorneys, they're standing up and saying to me, as officers of the court, they don't wish to violate the law, and I respect that.

So I'm going to suppress the evidence as a result of that disc, but I'm locking it up so that we have that disc. And I think you ought to consult with whoever you consult with to deal with the suppression issues -

. . . .

[Prosecutor]: The contents of that hard drive are - contain all of the counts in the indictment. So if you're suppressing . . . the actual child pornography that's contained thereon, then you're in effect –

The Court: In effect, dismissing –

[Prosecutor]: – dismissing –

The Court: – the case.

. . . .

The Court: If you'd like me to go ahead –

[Prosecutor]: – so that we could –

The Court: – and do an outright dismissal, then I dismiss it.

[Prosecutor]: Yes. So that we could Rule 3 it.

The Court: It's hereby dismissed.

After the trial court suppressed the evidence and dismissed the case against Defendant, the state filed a timely notice of appeal.

II. ANALYSIS

Risk of Federal Prosecution

As noted, the State argued in the trial court that Section 3509(m) of Title 18 of the United States Code, part of the Adam Walsh Act, effectively preempts discovery in child pornography cases and that conducting discovery in violation of the act could subject defense counsel to federal prosecution for possession of child pornography. 18 U.S.C. § 3509(m) provides:

> (1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.
>
> (2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by Defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of the title), so long as the Government

> makes the property or material reasonably available to Defendant.
>
> (B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to Defendant if the Government provides ample opportunity for inspection, viewing and examination at a Government facility of the property or material by Defendant, his or her attorney, and any individual Defendant may seek to qualify to furnish expert testimony at trial.

The question we must initially address is whether this statute preempts our own state rules regarding discovery in state prosecutions for crimes involving child pornography. This is a question of first impression in this state.

"The police powers of a state are not to be preempted by federal legislation unless that [is] Congress's clear and manifest purpose." *State v. Scott*, 678 S.W.2d 50, 51 (Tex. 1984). Congress's intent to preempt state laws must either be expressly stated in a federal statute or be implicit in the statute's structure and purpose. *Id.*

It can readily be seen that Section 3509(m) does not explicitly refer to state prosecutions. The law references Fed. R. Crim. P. 16 in superceding that rule's discovery procedures. The statute also refers to the prosecution as the "Government," a term typically used in federal statutes to denote the government of the United States not the government of a state. Finally, the statute is part of Part II of Title 18 of the United States Code which is dedicated to "Criminal Procedure." In the case of *State ex rel. Tuller v. Crawford*, 211 S.W.3d 676 (Mo. Ct. App. 2000), the

Missouri Court of Appeals relied on these factors in concluding that Section 3509(m) is a procedural provision applicable only to federal courts. *Id.* at 679. We agree with the reasoning of *Crawford* and hold that Section 3509(m) does not apply to proceedings in Tennessee state courts. Further, the statues does not criminalize any conduct that was not already illegal under Sections 2251. 2252 and 2252(A) of Title 18 of the United States Code long before the passage of Section 3509.

We have been unable to find a single state or federal criminal prosecution of defense counsel anywhere in the country based on counsel's possession of child pornography as part of a state's discovery procedures. We think the likelihood of federal prosecution of defense counsel in this case for possession of child pornography is remote at best and did not justify the suppression of evidence and dismissal of the prosecution of Defendant.

Moreover, even if Section 3509 were applicable to state proceedings, the statute has been interpreted to allow disclosure of offending materials where a defendant has shown that an analysis of the material at a government facility would be cost prohibitive; doubt about the reliability of an expert's equipment would be raised if the expert were forced to move the equipment; or that the expert's ability to analyze the material is so compromised that he is of no effective service to Defendant or Defendant's attorney. *See United States v. Knellinger*, 471 F.Supp. 2d 640, 647-48 (E.D.Va. 2007). In *Richard Allen Butler* the trial court and this Court found that forcing the defense expert to conduct the "extensive and exhaustive work" entailed in examining Defendant's computer hard drive in a law enforcement facility would com-

promise significantly the expert's usefulness to the defense. 2005 WL 735080, at * 11. Consequently, we held the trial court's orders compelling production of evidence along with protective orders to restrict the dissemination of the offending material solely in the preparation of the defense were reasonable and proper. *Id.* We believe this case is analogous to *Knellinger* and that even if Section 3509 were applicable to this prosecution the difficulties of discovery only in a law enforcement facility and the compromise to the effectiveness of the defense expert justify the orders of production in this case as well as the protective orders. Therefore, we hold that the trial court erred in dismissing this case out of fear that defense counsel would be subject to a federal prosecution under §3509.

Dismissal for Failure to Comply with Tennessee Rule of Criminal Procedure 16

Tennessee Rule of Criminal Procedure 16 governs most discovery issues in Tennessee criminal cases. The record in this case also reflects that the trial court was to some extent concerned about the prosecution's obstinate refusal to comply with the orders of both the trial court and this Court regarding discovery in this case. The dismissal of the indictment could be interpreted as punishment for the prosecution's pertinaciousness in the failing to follow the discovery orders. Although under certain circumstances exclusion of evidence and dismissal of a criminal prosecution is proper under Tennessee Rule of Criminal Procedure 16 for failure of the State to comply with discovery orders, that power should be used sparingly and only when necessary to avoid irremediable prejudice to Defendant from discovery violations. *See State v. Garland*, 617 S.W.2d 176,185

(Tenn. Crim. App. 1981). In light of the prosecution statements at the hearing in the trial court on this matter and the assurance of the attorney for the State at the appellate oral argument that the prosecution is now ready to comply with the discovery orders of this Court and trial court, we hold that exclusion of the computer images in question and dismissal of the prosecution were erroneous. If the prosecution is now willing to comply. the potential prejudice to Defendant is not irremediable.

We understand the frustration of the trial court over the persistent refusal of the prosecution to comply with court orders. However, exclusion of the evidence in question and dismissal of the indictment was not the proper method to punish the prosecution once a willingness even grudgingly expressed was made to at last comply with the discovery orders. Any further refusal to comply with the orders of the trial court should be punished with the court's contempt powers. *Garland*, 617 S.W.2d at 185.

CONCLUSION

In light of the foregoing the judgment of the trial court is reversed, the indictment is reinstated and the case is remanded for trial

/s/ Jerry L. Smith
Jerry L. Smith Judge

IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE AT KNOXVILLE
March 26, 2008 Session

[Filed FEB 12, 2009]

Direct Appeal from the Criminal Court
for Knox County
No. 77455 Mary Beth Leibowitz, Judge

No. E2007-01018-CCA-R3-CD

STATE OF TENNESSEE,

v.

RE'LICKA DAJUAN ALLEN,

J.C. MCLIN, Judge, dissenting.

Because the state, as the appellant, failed to meet its burden of proving that the trial court committed an abuse of discretion by suppressing the evidence, I must respectfully dissent from the majority.

The state's refusal to disclose the discovery material it was obligated to provide was a violation of the rules of discovery. Specifically, the rule states that: "[u]pon a defendant's request, the state shall disclose to the defendant . . . (I) the defendant's relevant written or recorded statements, or copies thereof . . . ." Tenn. R. Crim. P. 16(a)(1)(B). "'[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.' *Sample v. State*, 82 S.W.3d 267, 270 (Tenn. 2002)

(quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). A defendant may be accorded certain remedies based upon the state's noncompliance. Rule 16(d)(2)(A)-(D) of the Tennessee Rules of Criminal Procedure provides as follows:

> If a party hills to comply with this rule, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit the party from introducing the undisclosed evidence; or (D) enter such other order as it deems just under the circumstances.

The exchange of discovery matters is regulated by our Tennessee Rules of Criminal Procedure. Specifically, Rule 16(d)(2)(D) governs the exchange in criminal matters:

> Although Rule 16 of the Rules of Criminal Procedure does not explicitly provide as one of the sanctions the dismissal of the indictment after failure to comply with a discovery request or order, the rule does provide that the court may enter such sanction "as it deems just under the circumstances." Tenn. R. Crim. P. 16(d)(2)(D).
>
> This opened-ended language of the Rule authorizes the dismissal of an indictment in certain circumstances when a court would otherwise have "no effective sanction for failure to comply with its order." *State v. Collins*, 35 S.W.3d 582, 585 (Tenn. Crim. App. 2000); *see also State v. Freseman*, 684 S.W.2d 106, 107 (Tenn. Crim. App. 1984) (suggesting that if a trial court has the authority to dismiss a case as a sanction for failure to comply with discovery orders, it is

> implied authority pursuant to Tenn. R. Crim. P. 16(d)(2)). However, the Rule provides the court with many other methods for assuring compliance without resorting to such extreme measures. A trial court has wide discretion in fashioning a remedy for non-compliance with a discovery order, and the sanction should fit the circumstances of the *case. See Collins*, 35 S.W.3d at 585.

State v. Downey, - - - S.W.3d - - - , No. M2005-02335-SC-R11-CD, 2008 WL 3540371, at *9 (Tenn. 2008). After providing this analysis, the court held that "[Oven the discretion afforded the trial court in fashioning the penalty, we conclude that the trial court's decision to suppress . . . was sufficient penalty for the State's discovery violation." *Id.* Furthermore, "[i]t is well settled that decisions with regard to pretrial discovery matters rest within the sound discretion of the trial court. The decision of the trial court in discovery matters will not be reversed on appeal unless a clear abuse of discretion is demonstrated." *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992). "The abuse of discretion standard contemplates that before reversal the record must show that a judge 'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *State v. Coley*, 32 S .W.3d 831, 833 (Tenn. 2000) (citations omitted) *overruled on other grounds* by *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007).

In the instant case, the hearing on the state's motion to reconsider arose from the trial court's issuance of a third protective order requiring disclosure of the requested discovery materials under Rule 16 of the Tennessee Rules of Criminal Procedure. The state's blatant, continued refusal to disclose the re-

quested discovery created the very problem which forced the trial court to suppress the evidence. The trial court issued a total of three protective orders requiring disclosure, and the state refused to comply each time. The third order came after the appellate court, upon interlocutory appeal, affirmed the trial court's two previous orders. The state had ample time to comply, and its failure to do so is evidence of its intentional bad faith. The period of time ranging from the trial court's issuance of the first protective order to the passage of the Adam Walsh Act was more than two-and-half years. Assuming the state was entitled to excuse its delay in part based upon its reliance on the appellate court's interlocutory ruling, the state still refused to turn over the requested discovery for a period of more than one year and four months before the passage of the Adam Walsh Act. Even more importantly, the state has offered no justification for its failure to comply with the court's orders at any point in time. I would also note that the trial court's decision was further complicated by the state's eleventh-hour willingness to provide the discovery to the defendant only under threat of potential federal prosecution. Based on the passage of the Adam Walsh Act, it appeared that anyone, including defense counsel, its staff, or experts retained by the defendant, faced possible federal prosecution once they took possession of the discovery material. Given the precarious position that both the defendant and the court were placed in by the state if they accepted the discovery material, it is my view that the trial court did not err when it found that it had "no other reasonable alternative" but to suppress the evidence. *See State v. Smith*, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995).

As identified previously, the state, as the appealing party, has a duty to demonstrate that the trial court abused its discretion by suppressing the evidence. *Snyder*, 825 S.W.2d at 416. The state is unable to show how, or in what manner, the trial court committed such abuse. The state argues without citation to legal authority, that there was "no need for the trial court to take the drastic measure of *sua sponte* suppressing the evidence" and further contends that there was "no lawful basis" for suppression. As noted above, the trial court clearly had the discretion to suppress the evidence. *See Downey*, 2008 WL 3540371, at *9. It is the state who has appealed, and it is the state that has failed to meet its burden of showing that the trial court abused its discretion by suppressing the evidence or abused its inherent powers to dismiss a case for failure to comply with discovery. *Iverson v. Expert Tune, Inc.*, 553 So. 82, 87 (Ala. 1989).

I agree with the majority that the trial court could have and should have sanctioned the state by holding it in contempt for its willful non-compliance with the court's repeated orders. However, this remedy, in my view, is not one that the trial court was necessarily required to employ. Furthermore, arguing that the trial court erred because it did not exhaust all possible remedies before suppressing the evidence erroneously shifts the burden from the state as the appellant, whose obligation it is to show an abuse of discretion, by the trial court. The majority opinion imposes an affirmative duty upon the trial court to show why it did not hold the state in contempt or institute any other remedies before suppressing the evidence. Because the function of this appellate court is to act as a court of error, it is my opinion that the majority opinion exceeds this court's authority by

requiring that the trial court first exhaust all other remedies before finding that it acted within its discretion under Rule 16 by suppressing the evidence in this case.

For the reasons stated above, I would affirm the judgment of the trial court.

/s/ J.C. McLin
J.C. McLin, Judge

Date Printed: 03/09/2009

Notice Date: 03/09/2009

Case Style: State of Tennessee vs. Re'licka Dajuan Allen, Alias

Case Number: E2007-01018-CCA-R3-CD

Action: Notice Date: 03/09/2009

Notice: Corrected Pages to Opinion/ Judgment Sent:

Trial Court: Knox County Criminal Court

Trial Court Number: 77455

A corrected page number 9 to the opinion released on 02/12/2009 is enclosed.

The Correction is in the 5th paragraph, 2nd line, "superceding" to "superseding".

> (2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by Defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of the title), so long as the Government makes the property or material reasonably available to Defendant.

> (B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to Defendant if the Government provides ample opportunity for inspection, viewing and examination at a Government facility of the property or material by Defendant, his or her attorney, and any individual Defendant may seek to qualify to furnish expert testimony at trial.

The question we must initially address is whether this statute preempts our own state rules regarding discovery in state prosecutions for crimes involving child pornography. This is a question of first impression in this state.

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It can readily be seen that Section 3509(m) does not explicitly refer to state prosecutions. The law references Fed. R. Crim. P. 16 in superseding that rule's discovery procedures. The statute also refers to the prosecution as the "Government," a term typically used in federal statutes to denote the government of the United States not the government of a state. Finally, the statute is part of Part 11 of Title 18 of the United States Code which is dedicated to "Criminal Procedure." In the case of *State ex rel. Tidier v. Crawford*, 211 S.W.3d 676 (Mo. Ct. App. 2000), the Missouri Court of Appeals relied on these factors in concluding that Section 3509(m) is a procedural provision applicable only to federal courts.

Id. at 679. We agree with the reasoning of Crawford and hold that Section 3509(m) does not apply to proceedings in Tennessee state courts. Further, the statues does not criminalize any conduct that was not already illegal under Sections 2251, 2252 and 2252(A) of Title 18 of the United States Code long before the passage of Section 3509.

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APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE
March 26, 2008 Session

[Filed MAR 9, 2009]

Direct Appeal from the Criminal Court
for Knox County
No. 77455 Mary Beth Leibowitz, Judge

No. E2007-01018-CCA-R3-CD

STATE OF TENNESSEE,

v.

RE'LICKA DAJUAN ALLEN,

ORDER

Appellee, Re'Licka Dujuan Allen, has filed a Petition for Rehearing in this appeal which was decided by this Court on February 12, 2009. The Court has reviewed the petition and finds it argues matters decided in the initial appeal. Consequently, the Court is of the opinion that Appellee's Petition for Rehearing must be denied.

It is so ORDERED, this the 9 day or March, 2009.

Per Curium

Smith, Wedemeyer, McLin (not participating)